Editor's note: (1) Reconsideration denied by Order of May 12, 1994; (2) Petition for Director review denied -- See 11 OHA 4 (June 3, 1994). (3) Appealed Civ.No. A94-301 CIV (D.Alaska, July 6, 1994: Stay pending resolution of suit in State of Alaska (Foster), 125 IBLA 291 (1993). (4) dismissed for lack of jurisdiction (from 9th Cir. decision) No. 95-36122; (5) Reversed -- D.Ct. on matter of jurisdiction [citing State of Alaska (Goodlataw), 140 IBLA 205 (1997)], 182 F.3d 672 (9th Cir. June 18, 1999) (6) request for rehearing denied, (Feb. 9, 2000)

STATE OF ALASKA
v.
WILLIAM T. BRYANT

IBLA 91-341 Decided March 21, 1994

Appeal from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., dismissing private contest and confirming Bureau of Land Management decision approving Native allotment application, declaring conflicting rights-of-way null and void in part, and rejecting in part conflicting State selections. AA 6092.

Affirmed.

1. Alaska: Native Allotments--Evidence: Prima Facie Case--Evidence: Preponderance

   In a private contest initiated by a state following a BLM decision holding a Native allotment for approval, the state must show by a preponderance of the evidence that the Native allotment application is not valid. A private contest is properly dismissed where a state, as contestant, fails to present a prima facie case that the Native allotment applicant has not used his allotment in conformity with applicable law.

2. Alaska: Native Allotments--Rights-of-Way: Federal Highway Act--Rights-of-Way: Nature of Interest Granted

   If, after a Native initiates use and occupancy of certain lands, an amended right-of-way grant for a Federal-Aid Highway is sought and granted by BLM across such lands subject to valid existing rights, completion of 5 years of use and occupancy coupled with timely filing of a Native allotment application vests an inchoate preference right arising from use and occupancy. That right relates back to the time when use and occupancy began, and takes precedence over the intervening amended right-of-way grant, which is properly declared null and void.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, Fairbanks, Alaska, for the State of Alaska; Mary Anne Kenworthy, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for William T. Bryant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska has appealed from a June 3, 1991, order of District Chief Administrative Law Judge John R. Rampton, Jr., granting William T. Bryant's motion to dismiss the State's private contest for failure to present a prima facie case that Bryant's Native allotment claim was invalid. The June order also confirmed a March 18, 1988, decision of the Alaska State Office, Bureau of Land Management (BLM), that held Bryant's Native allotment application (AA 6092) for approval, declared conflicting rights-of-way held by the State (A-052629 and A-062703) null and void in part, and rejected in part conflicting State selection applications (A-063041 and A-063042).

This appeal arises from conflicting claims to land located in secs. 30 and 31, T. 21 S., R. 10 W., and sec. 25, T. 21 S., R. 11 W., Fairbanks Meridian, Alaska. On July 14, 1960, the State filed right-of-way application A-052629 for a Federal-Aid Highway right-of-way and 53 material sites, designated by parcel numbers, pursuant to the Federal Highway Act of August 27, 1958, 23 U.S.C. § 317 (1988). On October 3, 1961, BLM issued separate decisions granting right-of-way A-052629 for each individual material site, including parcel 14-1 which contained approximately 500 acres within portions of protracted secs. 25 and 36, T. 21 S., R. 11 W., and protracted secs. 30 and 31, T. 21 S., R. 10 W., Fairbanks Meridian, Alaska. In a relinquishment filed on January 4, 1988, and accepted by BLM on February 9, 1988, the State relinquished all but 4.006 acres of parcel 14-1 within sec. 30, T. 21 S., R. 10 W., Fairbanks Meridian.

On November 9, 1962, BLM granted right-of-way A-052629 for the highway, authorizing the construction and maintenance of a 102.53-mile long segment (the George Parks Highway) in the Talkeetna-to-Summit section of a planned highway between Fairbanks and Anchorage. The highway right-of-way as requested and approved included parts of secs. 30 and 31, T. 21 S., R. 10 W., and sec. 25, T. 21 S., R. 11 W., Fairbanks Meridian; however, no construction occurred at the location originally designated in the right-of-way application. On November 25, 1968, the State sought to amend the right-of-way grant in order to realign the portion of the original grant running through Tps. 21 S., Rs. 10 and 11 W., Fairbanks Meridian, among others. BLM issued an amended right-of-way grant for the realignment on May 13, 1969, subject to valid rights existing on the date of the grant, and this segment of the highway was constructed at the changed location between 1969 and 1971. Earlier, on June 24, 1965, the State had filed material site right-of-way application A-062703 seeking use of approximately 8.264 acres of land in sec. 30, T. 21 S., R. 10 W., Fairbanks Meridian, as a material source to aid in construction of the Parks Highway, although the lands it requested were already included within A-052629 (Parcel 14-1) (see Tr. 86-87). Nonetheless, BLM granted right-of-way A-062703 on September 30, 1965, subject to valid rights existing on that date.

On August 11, 1965, the State filed selection applications A-063041 and A-063042 under the provisions of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (July 7, 1958), for all available land within T. 21 S., R. 10

W., Fairbanks Meridian, and T. 21 S., R. 11 W., Fairbanks Meridian, respectively. On May 31, 1973, BLM tentatively approved State selection application A-063041, except for lands embraced within various Native allotment applications, including Bryant's Native allotment application AA-6092. BLM tentatively approved State selection application A-063042 on November 26, 1980, excluding, among others, lands in Native allotment application AA-6092.

On November 19, 1970, the Bureau of Indian Affairs (BIA) filed Native allotment application AA-6092 on behalf of William T. Bryant, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Native Allotment Act), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), subject to applications then pending. Bryant claimed use and occupancy of approximately 120 acres of land within secs. 30 and 31, T. 21 S., R. 10 W., and sec. 25, T. 21 S., R. 11 W., Fairbanks Meridian, commencing in August 1964. In his application Bryant stated that he had resided on the land between August and March each year from 1964 through the application date and that, while no improvements had been placed on the land, he had used the land for hunting (August through November each year), berrypicking (August and September each year), and trapping (November through March some years).

Two BLM employees examined the parcel on May 8, 1975, accompanied by Bryant. In a September 13, 1977, field report prepared after the examination, BLM resource specialist Robert A. Baker found that the Anchorage-Fairbanks (George Parks) Highway bisected the allotment and that material site right-of-way A-052629 (Parcel 14-1) encompassed 99 percent of the allotment and concluded that a potential for the claimed activities existed on the subject lands but that evidence found on the ground was inconclusive to show substantial use and occupancy as required by the regulations. Thereafter, BLM re-examined Bryant's Native allotment on July 25, 1979. Although Bryant was unable to attend, the field examiner contacted him by telephone on October 25, 1979, to attempt to verify his claimed use and occupancy. In a field report dated October 29, 1979, BLM realty specialist Mike Kasterin observed that no tangible evidence of use or occupancy before 1979 had been discovered on the allotment nor had the October 25, 1979, conversation with Bryant conclusively indicated such use or occupancy had occurred. While acknowledging that the resources necessary for the claimed uses existed on the land, the examiner was unable to conclude that Bryant had complied with the statutory and regulatory requirements of providing proof of 5 years of potentially exclusive use and occupancy of the land. Both the area manager and the district manager concurred with the report's findings and recommendations. By letter dated August 16, 1985, BLM notified Bryant that based on the field report, it appeared that he had not satisfied the use and occupancy requirements for the claimed land. He was allowed 60 days to provide evidence supporting his claim, to include statements demonstrating that he had occupied the requested land. In response, BIA submitted on Bryant's behalf statements from friends and family members attesting to his use and occupancy of his Native allotment.

On March 18, 1988, BLM determined that Bryant had satisfied the use and occupancy requirements of the Native Allotment Act. Since the requested lands were vacant, unappropriated, and unreserved at the time Bryant initiated his use and occupancy, BLM held for approval Bryant's Native allotment (surveyed as lot 5, U.S. Survey No. 7492, Alaska, situated at Milepost 178 on the George Parks Highway). In so doing, BLM found that the approved allotment would be subject to material site right-of-way A-052629 (Parcel 14-1), granted before Bryant began his use and occupancy of the land. BLM then declared amended highway right-of-way A-052629 and material site right-of-way A-062703 null and void as to those portions of the rights-of-way in conflict with Bryant's Native allotment. BLM found that the rights-of-way were issued subject to valid rights existing as of the effective dates of the grants, including Bryant's inchoate preference right to a Native allotment established by commencement of use and occupancy in August 1964, which vested upon his timely filing of an allotment application and evidence of use and occupancy on November 19, 1970. BLM explained that the vested right to an allotment related back to Bryant's initiation of use and occupancy to preempt intervening and conflicting State right-of-way applications. BLM also rejected State selection applications A-063041 and A-063042 to the extent they embraced lands within Bryant's allotment since Bryant's occupancy of those lands at the time of the State's applications prevented them from being vacant, unappropriated, and unreserved public lands subject to selection.

On May 17, 1988, the State filed a private contest against Bryant's Native allotment application pursuant to 43 CFR 4.450. The contest complaint challenged the sufficiency of Bryant's claimed use and occupancy to meet the Native Allotment Act's requirements of continuous, open, notorious, and potentially exclusive use of the land, and raised legal issues supporting the position that the application should have been denied to the extent it conflicted with amended highway right-of-way grant A-052629 and material site right-of-way A-062703.

Administrative Law Judge John R. Rampton, Jr., held a hearing in the State's contest on May 22 and 23, 1990, in Anchorage, Alaska. The State called five witnesses at the hearing and indicated that it wanted to present the testimony of two others who were not then available. The State's hearing witnesses included Constance VanHorn, a BLM employee who certified that various exhibits were official BLM records; Timothy J. Nagy, an Alaska Railroad employee who had worked maintaining the railroad track near the allotment and had hunted and trapped in the area since the fall of 1969; Shari Howard, a State of Alaska Department of Transportation and Public Facilities employee who worked in the right-of-way section and was familiar with the grants at issue; Robert A. Baker, a former BLM employee who had examined Bryant's allotment in 1975 and had prepared the 1977 field report for the allotment; and James M. Lane, a contractor who had been the project engineer on the Parks Highway Project near Honolulu Creek through the land at issue from the summer of 1969 through 1971 or early 1972. Bryant did not produce any witnesses, choosing instead to wait until the State had completed its case in chief before putting on his case. After the hearing, the

State submitted the deposition of one additional witness, Ron Miller, who had worked for the State during the summers of 1969 through 1972 as the survey crew chief on the Parks Highway project through the land at issue, and rested its case. Bryant then moved to dismiss the State's contest, asserting that the State had failed to present a prima facie case that Bryant was not entitled to a Native allotment.

In his June 3, 1991, order, Judge Rampton addressed only the issue of whether the State had presented a prima facie case that Bryant had failed to use his claimed allotment in conformity with the requirements of the Native Allotment Act. Observing that the State had the burden of proving that the BLM decision approving the allotment was wrong based on evidence not of record when BLM made its decision, he concluded that the testimony of the State's witnesses was inadequate to establish a prima facie case. He found that Baker's testimony that he spent less than 1 hour examining Bryant's allotment in 1975 and that he did not attempt to locate the allotment corner markers demonstrated that his examination of the claim was inadequate to undercut BLM's decision to hold the allotment for approval, especially since a second field examination was later conducted. Judge Rampton found the testimony of Nagy, Lane, and Miller that they had not seen Bryant in the vicinity of the claimed allotment when they had been in the area was less compelling than evidence the Board had held insufficient to establish a prima facie case in United States v. Estate of George D. Estabrook, 94 IBLA 38, 44 (1986). Accordingly, he dismissed the State's contest complaint for failure to present a prima facie case and confirmed the BLM decision.

On appeal the State disputes both Judge Rampton's dismissal of the contest for failure to establish a prima facie case that Bryant was not entitled to a Native allotment and BLM's finding that the State's rights- of-way are null and void to the extent they include lands within Bryant's Native allotment. As an initial matter, the State objects that the burden of proof in the private contest proceeding should have been assigned to Bryant because the Native Allotment Act, 43 U.S.C. § 270-3 (1970), requires that an allotment applicant provide "proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years." The State also contends that testimony offered
at hearing was sufficient to establish a prima facie case, and proved that Bryant did not have substantial actual possession of the land and that his use of the land was not potentially exclusive of others.

The State then attacks the BLM decision partially voiding amended highway right-of-way A-052629 and material site right-of-way A-062703; it is contended that the land claimed by Bryant was not available for a Native allotment because material site right-of-way A-052629 (Parcel 14-1) and original highway right-of-way A-052629 were granted before Bryant began his use and occupancy and that the lands included within the right-of-way grants must, therefore, be excluded from Bryant's allotment. The State further argues that the voided right-of-way grants were valid existing rights to which Bryant's Native allotment was subject, and concludes that Bryant's inchoate preference right to an allotment was insufficient to

prevent BLM from issuing grants for public purposes such as the State's rights-of-way. It is urged that the Board's contrary conclusions in State of Alaska, Golden Valley Electric Association (State of Alaska, GVEA), 110 IBLA 224 (1989), dismissed, State of Alaska v. Lujan, Civ. No. F90-006 (D. Alaska May 19, 1993), appeal filed (9th Cir. July 16, 1993), and Golden Valley Electric Association (On Reconsideration) (GVEA (On Reconsideration)), 98 IBLA 203 (1987), are erroneous and must be overruled. The State also charges that Bryant and BLM are estopped to deny the validity of the right-of-way grants, that BLM's failure to consider the public need for the rights-of-way constitutes an abuse of discretion, and that 43 U.S.C. § 1166 (1988), which limits the time in which a suit to annul a patent may be brought, bars BLM from voiding the right-of-way grants. The State requests that Judge Rampton's order dismissing the contest be reversed and Bryant's allotment claim be denied where it conflicts with the State's rights-of-way.

The Native Allotment Act granted the Secretary of the Interior authority to allot "in his discretion and under such rules as he may prescribe" vacant, unappropriated, and unreserved nonmineral land in Alaska not to exceed 160 acres to any qualified Indian, Aleut, or Eskimo. 43 U.S.C. § 270-1 (1970). Entitlement to an allotment depends upon proof "satisfactory to the Secretary" of substantially continuous use and occupancy of the land for a 5-year period. 43 U.S.C. § 270-3 (1970). A Departmental regulation implementing the Act provides that:

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

43 CFR 2561.0-5(a).

[1] If the State initiates a private contest of a Native allotment application approved by BLM, the State has both the burden of going forward with the evidence and the ultimate burden of persuasion that the applicant is not entitled to the land under the Native Allotment Act. Ira Wassillie (On Reconsideration), 111 IBLA 53, 59 (1989). Placing those burdens on the State does not contravene the Act's mandate that an applicant prove to the Secretary's satisfaction that he qualifies for an allotment since BLM's decision approving the allotment, which is presumed to be valid, confirms that the applicant has already shown he is entitled to an allotment. Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128, 135-36 (1989). In order to prevail, the State must establish by a preponderance of the evidence that BLM's decision was wrong. Id. After the State rested its case in chief, Bryant moved to dismiss the contest because the State had not proved a prima facie case. The term "prima facie" means that the case is adequate to support the contest and that no further proof is needed to nullify the claim. See United States v. Estabrook, 94 IBLA at 43, and cases cited. Based on our review of the evidence presented by the State, we find

that the State failed to present a prima facie case to support the contest complaint and affirm the order dismissing the contest.

Bryant began his use and occupancy in August 1964, fulfilled the 5-year use and occupancy requirement by August 1969, and filed his Native allotment application on November 19, 1970. Consequently, evidence of use or non-use of the allotment after November 19, 1970, cannot support a challenge to the sufficiency of his prior qualifying use and occupancy, but is simply irrelevant to that question. The testimony of the four primary witnesses relied upon by the State to establish its case was therefore insufficient to establish that Bryant did not substantially use and occupy his allotment during the relevant 5-year period at issue, because their testimony failed to address that question fully.

The State called Baker, the BLM employee who had examined the allotment in 1975 and prepared the 1977 field report, as one of its witnesses. In his testimony Baker recounted his field examination and his conclusion that the evidence of substantial use and occupancy was inconclusive. He admitted, however, that he had spent less than an hour on the land (Tr. 159), that he did not investigate whether the corners had been posted or examine more than a small part of the allotment (Tr. 156), that there was deep snow obscuring any evidence that might have been found on the ground (Tr. 159), and that, in hindsight, he would have done the field examination differently (Tr. 181). This Board has held that a field examination of a Native allotment is not sufficiently thorough if only a part of the allotment was actually examined for use and occupancy. See Linda L. Walker, 23 IBLA 299, 302 (1976). Therefore Baker's testimony was inadequate to support the State's contest complaint. See United States v. Estabrook, 94 IBLA at 45.

Nagy, an Alaska Railroad employee, testified that he lived approximately 7 miles south of the allotment from the fall of 1969 until the summer of 1975, and that his work consisted of maintaining about 20 miles of track in the area near the allotment (Tr. 37-38, 47). He also hunted, fished, and trapped in the area beginning in the fall of 1969 (Tr. 39). Nagy stated he did not know Bryant, had never seen him on the land, would have been aware of anyone on the land, and had not observed any improvements on the land in 1969 or the early 1970's (Tr. 40-43). He further testified that he drove the relevant part of the Parks Highway after it opened in 1971 and never saw any activity on the land embraced by the allotment (Tr. 45-46). Nagy admitted, however, that he first hunted in the Honolulu Creek area in September 1970 when it took him 2 weeks of after-work and weekend hunting to get a moose (Tr. 60-61), and that he did not begin trapping in the Honolulu Creek area until November 1970 when he set traps near the railroad track from 3/4 mile to 5 miles north of the creek (Tr. 66). He also acknowledged that a ridge of hills between the railroad and the Parks Highway obstructed the view of the highway from the area he trapped (Tr. 77-78 and Contestant's Exh. 6). We find Nagy's failure to venture near Bryant's allotment prior to November 1970 coupled with the remoteness of the allotment from the area he hunted and trapped make his testimony inadequate to establish that Bryant did not substantially use and occupy the allotment during the relevant time.

Lane, the project engineer on the Parks Highway Project in the area of Honolulu Creek, worked on the highway project from the summer of 1969 through winter shutdown (Tr. 199) and for the entire construction season in 1970 (Tr. 203), but lived approximately 8 miles from Bryant's claim during that time (Tr. 213-14, 221). He explained that clearing the route for the highway began in the late summer of 1969 and continued until winter shutdown in October or November with additional clearing in 1970 (Tr. 199, 221-22). Although Bryant's application did not claim improvements, Lane testified there was a deteriorated log cabin on the allotment, which he first described as appearing to be abandoned (Tr. 199) but later clarified was not necessarily unlivable (Tr. 217), near the center line of the road, concluding there was nothing else present on the land to indicate someone claimed it (Tr. 199-200). He stated that he ordered the destruction of the cabin in either the fall or late summer of 1969 (Tr. 214-15). He further reported there were two material sites located near Honolulu Creek which were first used in the summer of 1970 (Tr. 201). Lane was unable to recall whether he had ever seen Bryant on the land (Tr. 202) or whether he had observed any signs of use of the land when he returned to the area in March or April 1970 (Tr. 222-23). We find that Lane's uncertainty and the minimal amount of time he spent in the vicinity of Bryant's allotment during the relevant time undercut the effectiveness of his testimony as support for the State's contest against Bryant's allotment.

Miller's testimony, taken in a deposition after the hearing, is similarly flawed. He was party chief for a survey crew that surveyed the centerline of the Parks Highway Project near Honolulu Creek and worked on the project from mid-May to early September in 1969, 1970, and 1971 (Deposition (Dep.) Tr. 8). He admitted that he was not in the area at all during the fall, winter, or spring months and would not necessarily been aware of anyone using the land for hunting, trapping, or fishing during those years (Dep. Tr. 36-37). He could not say that Bryant was not using the land during the time claimed (Dep. Tr. 37). These acknowledgements undermine the pertinence of his testimony to the issue of Bryant's entitlement to an allotment.

Neither VanHorn's testimony certifying the BLM records offered by the State as exhibits nor Howard's testimony concerning the right-of-way grants nor Bryant's failure to protest those grants bolsters the State's attempt to make a prima facie case against Bryant's allotment. We find that the State's evidence is even less persuasive than the evidence the Board found insufficient to establish the contestant's prima facie case in United States v. Estabrook, 94 IBLA at 43-45. Accordingly, we affirm the order dismissing the State's contest complaint for failure to present a prima facie case.

[2] The State asks that we overrule decisions issued by the Board in State of Alaska, GVEA, 110 IBLA at 227, 229, and GVEA (On Reconsideration), 98 IBLA at 205, 208, cases finding that a Native allotment will not be made subject to a right-of-way grant where the initiation of qualifying use and occupancy by the Native preceded issuance of a right-of-way grant, so long as the allotment applicant has since completed the required 5-year period

of use and occupancy and filed a Native allotment application. The key to these cases lies in the concept of "relation-back." Under that doctrine, although a Native allotment applicant's inchoate statutory preference right to an allotment does not vest until completion of the required use and occupancy and the filing of a timely application, once the preference right vests it relates back to the initiation of use and occupancy and preempts conflicting applications filed after that time. We have previously refused to overrule these decisions and again decline to do so for reasons stated in State of Alaska Department of Transportation & Public Facilities, 125 IBLA 291, 293 (1993) and cases cited therein (a case, like this one, where changes to a right-of-way grant amended after initiation of native use and occupancy became subordinate to a Native claim).

Bryant began to use and occupy his allotment in August 1964, before the State's June 24, 1965, application for material site right-of-way A-062703 and BLM's September 30, 1965, grant of the right-of-way, and before the State, on November 25, 1968, requested to amend highway right-of-way A-052629 and BLM, on May 13, 1969, issued the amended highway right-of-way. With completion of 5 years use and occupancy and the November 19, 1970, filing of his Native allotment application, Bryant's right to his allotment vested effective with his August 1964 initiation of use. Because Bryant's right preceded the September 30, 1965, effective date of material site right-of-way A-062703, and the May 13, 1969, effective date of amended highway right-of-way A-052629, those rights-of-way, which were granted subject to valid rights existing on their effective dates, were issued subject to the Native allotment. The fact that the State's original November 1962 highway right-of-way grant for the Parks Highway preceded Bryant's August 1964 initiation of use and occupancy does not change this result, nor does it permit the allotment to be made subject to the original right-of-way grant. State of Alaska Department of Transportation & Public Facilities, 125 IBLA at 294-95.

We find no merit in the contention that land embraced within Bryant's allotment was unavailable because the bulk of that land was included within material site right-of-way A-052629 (Parcel 14-1), issued on October 3, 1961, before Bryant began his use and occupancy. The record shows the State did not begin to use this material site until 1970. See Tr. 201. A material site right-of-way grant does not transfer title to land or remove it from the Secretary's jurisdiction; instead, regulations in effect when the right-of-way was granted limited such grants so that:

> No interest granted by the regulations in this part shall give the holder thereof any estate of any kind in fee in the lands. The interest granted shall consist of an easement, license, or permit in accordance with the terms of the applicable statute; no interest shall be greater than a permit revocable at the discretion of the authorized officer unless the applicable statute provides otherwise.

43 CFR 244.7(a) (1963). The regulations also recognized that persons might enter or otherwise appropriate a tract of public land to which a

right-of-way had attached, but that they "take the land subject to such right-of-way." 43 CFR 244.7(b) (1963). BLM's decision holding Bryant's Native allotment for approval that made the allotment subject to material site right-of-way A-052629 (Parcel 14-1), complied with the applicable regulations and protected the State's continued use of the material site until the need for that site ceased. Both 23 U.S.C. § 317(c) (1988) and 43 CFR 244.54(b)(3) (1963) required the State to give notice when need for land or materials for the Federal-Aid Highway ceased to exist and provided that such lands or materials immediately reverted to BLM's control. The State's relinquishment of all but 4.006 acres of the original 500-acre site demonstrated that the remainder of the site was no longer needed by the State and abrogated the State's interest in that land.

The Board has previously considered and rejected the remaining legal arguments raised by the State. In State of Alaska, GVEA, we addressed the State's estoppel arguments, stating:

The State asserts that it relied in good faith on the issuance of its rights-of-way, receiving no notice from either problem with those rights-of-way. Among other factors, a crucial misstatement in an official decision is an express precondition for invoking estoppel. Cyprus Western Coal Co., 103 IBLA 278 (1988), and cases there cited. There was no affirmative misrepresentation or concealment of the facts by Departmental officials. Again, as previously discussed, the rights-of-way were issued subject to valid existing rights.

110 IBLA at 231. To accede to the State's estoppel argument would be to grant a benefit not authorized by law. Nothing in the cases cited by the State supports such a proposition. See State of Alaska Department of Transportation & Public Facilities, 124 IBLA at 391-92. The contention that BLM abused its discretion by failing to consider the public need for the rights-of-way must also be rejected. The Board has acknowledged that under the Native Allotment Act, the Secretary is afforded discretion in adjudicating allotment applications; while cases such as Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985); and Degnan v. Hodel, No. A87-252 Civil (Feb. 15, 1989) circumscribe the Secretary's discretion, no case cited by the State allows the Secretary to reach the result it seeks. See State of Alaska Department of Transportation & Public Facilities, 124 IBLA 386, 392 (1992). Similarly mistaken is a contention that rejection of a prior invalid allotment application (A-062054) made by Bryant for other land in the vicinity somehow limited his instant application. This argument apparently confuses the requirement that there be qualifying use with questions of the segregative effect of such use. Nonetheless, no legal or logical reason has been provided to show how rejection of an application for other lands that were withdrawn from Native entry affected the application presently before us.

The State also contends that cancellation of the rights-of-way was contrary to 43 U.S.C. § 1166 (1988), providing that "[s]uits brought by the United States to vacate and annul any patent shall only be brought within six years after the date of issuance of such patents." A right-of-way grant, however, is not an application for title and does not pass title. State of Alaska v. Albert, 90 IBLA 14, 21 (1985). Therefore, the statute has no application. State of Alaska Department of Transportation & Public Facilities, 124 IBLA at 392.

To the extent the State has made other arguments that have not been expressly discussed, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge